

# Employment Law Update

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The EAT has been extremely busy with a number of decisions being handed down this month. Some are about procedure, others conduct during a hearing. In our view all interesting topics. Also a few GDPR tips.

## Talk isn't Cheap

The Claimant in the case of *Chidzoy v BBC* made the grave error of judgment of speaking with journalists during an adjournment in proceedings. The Claimant was at the time still under oath.

Unfortunately for the Claimant the discussion with the journalist was overheard by the Respondent.

The Respondent made an application for the claim to be struck out under rule 37 (1) (b) and (e) Schedule 1 of the Employment Tribunals (Constitution and Rule of Procedure) Regulations 2013. The Respondent successfully argued that the Claimant's conduct was unreasonable and that a fair hearing could not take place.

The Claimant appealed to the Employment Appeal Tribunal. The Claimant lost. The test in *Bolch v Chipman* had been correctly applied concluded the EAT. Namely that the Tribunal had considered whether the Claimant had conducted herself reasonably, whether a fair trial was still possible, whether a lesser sanction might be more appropriate and what the consequences of a strike out would be. In conclusion, the Claimant's actions in speaking to a journalist, despite warnings to the contrary had costs her the claim.

## Shared Parental Leave

In the case of *Capita v Ali*, the issue of pay and shared parental leave was considered. This relatively new concept of sharing leave post the birth of a child between the parents, (following the initial 2 weeks compulsory leave) has given rise to a question of discrimination.

Could it be direct sex discrimination of shared parental leave is not enhanced when maternity pay is enhanced?

No, held the EAT. In its reasoning the EAT looked at the purpose of maternity leave itself and concluded that this was for the recovery of the woman post birth. The pay provided to the woman in enhanced maternity pay, was inextricably linked to the fact that she had given birth and was in recovery.

The EAT further noted that shared parental leave and pay is given by the Respondent in the case on exactly the same terms for men and women and therefore no direct discrimination arises.

Special treatment given to a woman as a consequence of pregnancy or childbirth was also permitted under s13(6)(b) of the Equality Act.

## Does Silence Equate to Acceptance?

In the case of *Abrahall v Nottingham City Council*, the Court of Appeal was asked to consider whether silence amounted to acceptance of a variation in the contract.

Nottingham City Council had sought to regularise its pay system, this would mean that pay was transparent and increments would be by reference to a single system of pay scales. Shortly after implementing the new system, the Council issued a pay freeze for two years.

In the first instance no action was taken by the employees and no grievances were raised. At the end of the two year period the Council announced that it wanted to extend the pay freeze for a further period. At this point the unions issued a collective grievance and then brought claims on behalf of their members against the Council.

The Court of Appeal made two significant findings, first that there was a contractual right to incremental pay increases each year. Secondly that silence was not acceptance of the variation that had been imposed by the Council in the preceding 2 years.

The Court of Appeal gave points of guidance for future claims of this type:

- Each case must be considered on its facts
- Acceptance by silence should only be inferred where there is no other reasonable explanation
- If the variation is unfavourable, then acceptance is less likely to be inferred
- Collective protests are likely to suffice
- If the employer represents that there is no variation of contract, when in reality there is, the acceptance by silence argument shall be weakened.

What does this teach us? You must ensure when a contract is changed that explicit acceptance is given from the employees. Even after 2 years of working under the variation silently, acceptance of the variation could not be guaranteed. Lastly, be conscious that cost saving and preservation of jobs may not be enough to make an unfavourable change unless agreement has been explicitly reached. Consultation, openness and agreement with employees is key.

## GDPR

Points to consider for compliance with the upcoming General Data Protection Regulations (GDPR):

- Consider processing personal data so the individual cannot be identified from it;
- If processing data on an employee for research purposes do you need their name? Or can it be anonymised?
- Use passwords and encourage employees to change theirs regularly;
- Encrypt where possible;
- What do you allow on transportable devices like laptops and smartphones? Are they secure? Are they password protected? Where do they go? What do they contain? What are your policies? Do you employees know and abide by your policies and procedures?
- How do you record your compliance?
- Only process data if necessary? How do you determine whether processing is necessary?
- Have you communicated to your employees what you will process and why?
- How will you securely destroy information you no longer need? How will you audit to ensure you are no retaining data that is no longer required?

Turning your mind to these questions ahead of the implementation of GDPR on 25 May 2018 and ensuring your staff are fully versed in compliant practices, will hopefully make you feel GDPR confident.

## Injury to Feelings

Are injury to feelings taxable? No held the Court of Appeal in *Moorthy v HMRC*. This question has been debated for some time, but the Court of Appeal has finally but pay to the question. It found that injury to feelings do fall within the exemption applied to injuries generally for personal injury purposes and therefore were not taxable.

## And finally.....

So ends another newsletter. If any questions arise as a consequence, as always, please do not hesitate to call.

Bye for now.

Lynsey and the team.

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